No. 06-8273

In The Supreme Court of the United States

STEPHEN DANFORTH,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Are states required to apply this Court's retroactivity doctrine when determining federal constitutional issues in criminal collateral review proceedings?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
I. THIS COURT'S DECISIONS DEFINING THE RETROACTIVITY OF FEDERAL CONSTITUTIONAL RIGHTS ARE BINDING ON STATE COURTS APPLYING THOSE CONSTITUTIONAL RIGHTS	8
II. *GRIFFITH-TEAGUE* IS BINDING FEDERAL AUTHORITY BECAUSE IT IS ESSENTIAL TO VINDICATE PRINCIPLES OF SUPREMACY, JUDICIAL INTEGRITY, FINALITY AND FEDERALISM	18
A. Supremacy and Judicial Integrity	18
B. Finality-Federalism	25
III. IF A STATE WISHES TO SELECTIVELY CREATE PREFERRED OR ENHANCED RIGHTS FOR ITS CITIZENS, FEDERALISM AND STATES RIGHTS REQUIRE STATES TO DO SO UNDER STATE LAW THAT IS SUBJECT TO THE LEGAL AND POLITICAL CONSTRAINTS ATTENDANT TO STATE LAW DECISIONS	32

TABLE OF CONTENTS – Continued

Page

IV. THE STRONG INTERESTS *TEAGUE* RESTS UPON AND THE LACK OF ANY LEGITIMATE COUNTERVAILING STATE INTEREST REQUIRES *TEAGUE* APPLY TO STATE COLLATERAL REVIEW PROCEEDINGS..... 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

U.S. CONST. amend. IV 33

U.S. CONST. amend. VI 4, 20, 35

U.S. CONST. amend. VIII 14

U.S. CONST. amend. XI 31

U.S. CONST. art. III, § 1 1

U.S. CONST. art. III, § 2 1

U.S. CONST. art. VI, cl. 2 ..... 2, 15, 19

FEDERAL STATUTES

28 U.S.C. § 2254 (1966) 16

28 U.S.C. § 2254 (1996) 16

28 U.S.C. § 2255 27

FEDERAL CASES

American Trucking Associations, Inc. v. Smith, 496 U.S. 167 (1990) ..... *passim*

Arsenault v. Massachusetts, 393 U.S. 5 (1968) 10

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 23

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 17

Beard v. Banks, 542 U.S. 406 (2004) 29

Blakely v. Washington, 542 U.S. 296 (2004) 21, 35

Bousely v. United States, 523 U.S. 614 (1998) 28

Brown v. Allen, 344 U.S. 443 (1953) 9

TABLE OF AUTHORITIES – Continued

Page

Butler v. McKellar, 494 U.S. 407 (1990) 11, 20, 29

Calderon v. Thompson, 523 U.S. 538 (1998) 29

Case v. Nebraska, 381 U.S. 336 (1965) 10

Caspari v. Bohlen, 510 U.S. 383 (1994) 20, 30

Collins v. Youngblood, 497 U.S. 37 (1990) 30, 31

Crawford v. Washington, 541 U.S. 36 (2004) .. 4, 20, 21, 22, 23

Daniels v. United States, 254 F.3d 1180 (10th Cir. 2001) 28

Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266 (2006) 21

Desist v. United States, 394 U.S. 244 (1969) 9

DeStefano v. Woods, 392 U.S. 631 (1968) 10

Engle v. Isaac, 456 U.S. 107 (1982) 28

Felder v. Casey, 487 U.S. 131 (1988) 37

Gideon v. Wainwright, 372 U.S. 335 (1963) 14

Gilberti v. United States, 917 F.2d 92 (2d Cir. 1990) 28

Gilmore v. Taylor, 508 U.S. 333 (1993) 20, 29

Godinez v. Moran, 509 U.S. 389 (1993) 31

Gonzales v. Oregon, 546 U.S. 243 (2006) 37

Graham v. Collins, 506 U.S. 461 (1993) 20

Griffith v. Kentucky, 479 U.S. 314 (1987) ..... *passim*

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 15, 17, 19, 30, 37

Harris v. New York, 401 U.S. 222 (1971) 32

Horn v. Banks, 536 U.S. 266 (2002) 16, 22

TABLE OF AUTHORITIES – Continued

Page

Idaho v. Wright, 497 U.S. 805 (1990) 3

Johnson v. New Jersey, 384 U.S. 719 (1966) 10

Kansas v. Marsh, ___ U.S. ___, 126 S. Ct. 2516 (2006) 25

Kitchens v. Smith, 401 U.S. 847 (1971) 10, 14, 38

Lambrix v. Singletary, 520 U.S. 518 (1997) 11, 20

Lang v. United States, 474 F.3d 348 (6th Cir. 2007) 28

Lawrence v. Florida, ___ U.S. ___, 127 S. Ct. 1079 (2007) 12, 22

Linkletter v. Walker, 381 U.S. 618 (1965) ..... *passim*

Mackey v. United States, 401 U.S. 667 (1971) 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 8

Martin v. Hunter's Lessee, 14 U.S. 304 (1816) 19

McConnell v. Rhay, 393 U.S. 2 (1968) 10

Michigan v. Long, 463 U.S. 1032 (1983) 19

Michigan v. Payne 412 U.S. 47 (1973 ..... 5, 14

Myers v. Ylst, 897 F.2d 417 (9th Cir. 1990) 24

Nunley v. Bowersox, 394 F.3d 1079 (8th Cir. 2005) 22

Ohio v. Roberts, 448 U.S. 56 (1980) 4

Oregon v. Hass, 420 U.S. 714 (1975) 32, 33, 34, 36

Parke v. Raley, 506 U.S. 20 (1992) 31

Patsy v. Board of Regents of Fla., 457 U.S. 496 (1982) 31

Pennsylvania v. Finley, 481 U.S. 551 (1987) 12

Penry v. Lynaugh, 492 U.S. 302 (1989) 12

TABLE OF AUTHORITIES – Continued

Page

Peretz v. United States, 501 U.S. 923 (1991) 30

Pickelsimer v. Wainwright, 375 U.S. 2 (1963) 14, 38

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) ... 8, 25

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 17

Ring v. Arizona, 536 U.S. 584 (2002) 21, 22

Roper v. Simmons, 543 U.S. 551 (2005) 14, 38

Saffle v. Parks, 494 U.S. 484 (1990) 13, 20

Sawyer v. Smith, 497 U.S. 227 (1990) 20

Schriro v. Summerlin, 542 U.S. 348 (2004) 5, 30, 31

Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003) 28

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Tyler v. Cain, 533 U.S. 656 (2001) 14, 16

United States v. Ayala, 894 F.2d 425 (D.C. Cir. 1990) 28

United States v. Brown, 305 F.3d 304 (5th Cir. 2002) 28

United States v. Johnson, 457 U.S. 537 (1982) 10

United States v. Martinez, 139 F.3d 412 (4th Cir. 1998) 28

United States v. Moss, 252 F.3d 993 (8th Cir. 2001) 28

United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002) 28

United States v. Swindall, 107 F.3d 831 (11th Cir. 1997) 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Swinton, 333 F.3d 481 (3d Cir. 2003) 28

Van Daalwyk v. United States, 21 F.3d 179 (7th Cir. 1994) 28

Wainwright v. Sykes, 433 U.S. 72 (1977) 9

Wallace v. Kato, ___ U.S. ___, 127 S. Ct. 1091 (2007) 37

Whorton v. Bockting, ___ U.S. ___, 127 S. Ct. 1173 (2007) 5, 20, 21, 36

Williams v. Armantrout, 891 F.2d 656 (8th Cir. 1989), vacated on other grounds, 912 F.2d 924 (8th Cir. 1990) 24

Williams v. Taylor, 529 U.S. 362 (2000) 16

Williams v. United States, 401 U.S. 676 (1971) 25, 26, 27

Witherspoon v. Illinois, 391 U.S. 510 (1968) 10

Wright v. West, 505 U.S. 277 (1992) 13, 16

Yakus v. United States, 321 U.S. 414 (1944) 30

Yates v. Aiken, 484 U.S. 211 (1988) 11, 12, 15, 38

Younger v. Harris, 401 U.S. 37 (1971) 28

MINNESOTA CASES

Danforth v. State, 2000 WL 1780244 (Minn. Ct. App. Dec. 5, 2000) 4

Danforth v. State, 700 N.W.2d 530 (Minn. Ct. App. 2005) 1, 4

Danforth v. State, 718 N.W.2d 451 (Minn. 2006) 1, 3, 4, 5

State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006), cert. denied, 127 S. Ct. 382 (2006) 21

TABLE OF AUTHORITIES – Continued

Page

State v. Danforth, 573 N.W.2d 369 (Minn. Ct. App. 1997) 1, 2, 3

State v. Houston, 702 N.W.2d 268 (Minn. 2005) 21

State v. Krasky, A04-2011, 2007 WL 2264711 (Minn. August 9, 2007) 21

State v. Scacchetti, 711 N.W.2d 508 (Minn. 2006) 21

OTHER STATE CASES

Hairston v. State, 156 P.3d 552 (Idaho 2007) 21, 24

Smart v. State, 146 P.3d 15 (Alaska Ct. App. 2006), rev. granted (Feb. 2007) 18, 21, 35

Whitfield v. State, 107 S.W.3d 253 (Mo. 2003) 21, 24

OTHER AUTHORITIES

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 9

Court Statistics Project, *State Court Caseload Statistics*, 2005 (National Center for State Courts 2006), Table 1 19

Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990) 8

Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1 (1985) 19

Laurence H. Tribe, *American Constitutional Law* 31-33 (1st ed. 1978) 34

Laurence H. Tribe, *American Constitutional Law* 263 (3rd ed. 2000) 33, 34

Larry Yackle, *Postconviction Remedies* (1981) 10

TABLE OF AUTHORITIES – Continued

Page

Leonidas Ralph Meeham, *Administrative Office of the United States Courts, 2005 Annual Report of the Director*, Table C-2A 22

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The Supreme Court, 2004 Term: The Statistics, 119 Harv. L. Rev. 415, 428 (2005) 22

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals affirming Petitioner's conviction on direct review and remanding for resentencing is at pages 4-20 of the Joint Appendix and is published at 573 N.W.2d 369 (Minn. Ct. App. 1997). The opinion of the Minnesota Court of Appeals affirming Petitioner's sentence is at pages 21-29 of the Joint Appendix. The Minnesota Supreme Court's denial of review is at page 30 of the Joint Appendix. The Hennepin County District Court's denial of Petitioner's second petition for postconviction relief is at pages 31-35 of the Joint Appendix. The opinion of the Minnesota Court of Appeals affirming the denial of Petitioner's second petition for postconviction relief is at pages 36-41 of the Joint Appendix and is published at 700 N.W.2d 530 (Minn. Ct. App. 2005). The opinion of the Minnesota Supreme Court affirming the Minnesota Court of Appeals' denial of Petitioner's second petition for postconviction relief is at pages 42-54 of the Joint Appendix and is published at 718 N.W.2d 451 (Minn. 2006).

CONSTITUTIONAL PROVISIONS

Article III sections 1 and 2 of the United States Constitution:

> Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a

compensation which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects.

Article VI paragraph 2 of the United States Constitution:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner is a "multiply-convicted pedophile with an extensive history of sexually abusing young boys during the 1970's and 1980's." *State v. Danforth*, 573 N.W.2d 369, 372 (Minn. Ct. App. 1997). On August 11, 1995, a neighbor

discovered J.S., a six-year-old boy, acting out in a sexual manner. When J.S.'s mother asked where he learned such things, J.S. identified "Steve." *Id.* J.S. participated in a videotaped interview at a non-profit sexual abuse center. *Id.* During the interview, J.S. revealed Petitioner had sexually abused him. *Id.* Petitioner was arrested and charged with first degree criminal sexual conduct. *Id.* Petitioner is a disbarred attorney and represented himself throughout the prosecution. *Id.* At Petitioner's request, the trial court held a competency hearing relating to J.S. *Id.* The trial court found J.S. incompetent to testify. *Id.* The trial court admitted J.S.'s videotaped interview, finding it bore sufficient indicia of reliability. *Id.*[1] Petitioner was found guilty and sentenced to a lengthy prison term.[2] Petitioner filed a direct appeal challenging, *inter alia*, the admission of J.S.'s videotaped interview. *Id.*, 573 N.W.2d at 374. The Minnesota Court of Appeals found the trial court properly admitted the interview because it bore "particularized guarantees of trustworthiness" required under *Idaho v. Wright*, 497 U.S. 805 (1990). *Id.*[3] On February 19,

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[1] J.S.'s five-year-old sister was competent and testified that she had seen "Steve" "put his mouth on J.S.'s "pee-pee" and "private" one day in the men's room by the pool at their aunt's apartment. *Id.*

[2] The trial court initially sentenced Petitioner to 216 months in prison. This determination was reversed because it violated the mandatory minimum sentence required under Minnesota law. The trial court then sentenced Petitioner to 316 months in prison, which was affirmed on appeal. *See Danforth v. State*, 718 N.W.2d 451, 454 (Minn. 2006).

[3] On appeal, Petitioner also urged that admitting the videotape was particularly harmful because the trial court also erred in finding J.S. incompetent. The Minnesota Court of Appeals found Petitioner had waived his right to challenge the incompetency ruling because he had, in fact, urged the trial court to find J.S. incompetent. *Danforth*, 573 N.W.2d at 376.

1998, the Minnesota Supreme Court denied review. Joint Appendix at 1.

On February 3, 1999, Petitioner filed his first petition for postconviction relief in Minnesota state court. The trial court denied relief. The Minnesota Court of Appeals affirmed, *Danforth v. State*, 2000 WL 1780244 (Minn. Ct. App. Dec. 5, 2000), and the Minnesota Supreme Court denied review.

On June 24, 2004, more than eight years after Petitioner was convicted, this Court issued *Crawford v. Washington*, 541 U.S. 36 (2004), holding that, under the Sixth Amendment confrontation clause, the reliability test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, would no longer control admission of out-of-court testimonial statements by unavailable witnesses. *Id.* at 61. On August 23, 2004, Petitioner filed a second state postconviction petition arguing that admitting J.S.'s videotaped interview violated the new federal rule announced in *Crawford* and seeking a new trial. The trial court found *Crawford* did not apply retroactively to Petitioner's case and denied relief. *Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006). The Minnesota Court of Appeals affirmed. *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. Ct. App. 2005).

The Minnesota Supreme Court accepted review. Applying the retroactivity principles this Court set out in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Teague v. Lane*, 489 U.S. 288 (1989), the court held that Petitioner was not entitled to the benefit of the *Crawford*'s new rule. The Minnesota Supreme Court found that it was "compelled" to follow the *Griffith-Teague* retroactivity framework set out by this Court. *Danforth*, 718 N.W.2d at 456.

Citing *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), *Michigan v. Payne* 412 U.S. 47 (1973), and *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Minnesota Supreme Court found that it was not "free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court." *Id.* Anticipating the precise result this Court reached in *Whorton v. Bockting*, ___ U.S. ___, 127 S. Ct. 1173 (2007), the Minnesota Supreme Court held "*Crawford* established a new rule of federal constitutional criminal procedure that is not within one of *Teague*'s exceptions," and denied relief. *Danforth*, 718 N.W.2d at 460.

On December 6, 2006, Petitioner filed a petition for a writ of certiorari asking this Court to review (1) the Minnesota Supreme Court's determination that it was bound to follow *Teague* in assessing the potential retroactive application of the new rule announced in *Crawford* and (2) the Minnesota Supreme Court's determination that he was not entitled to retroactive application of the *Crawford* decision. On May 21, 2007, this Court granted the petition, limited to Petitioner's first question.

SUMMARY OF THE ARGUMENT

This Court's decisions relating to the retroactivity of its federal constitutional rulings bind states. *Teague v. Lane* is part of a larger body of law by which this Court defines the reach of its federal constitutional rulings. The authority and binding nature of *Griffith*, *Teague*, later cases defining "new rules," "watershed rules," and rules placing certain conduct beyond the power of criminal

lawmaking authority are the same because the decisions form a complete and dependent doctrine. States cannot reject *Teague*'s general rule any more than they can reject *Griffith*, *Teague*'s new rule jurisprudence, or *Teague*'s exceptions. There is no principled reason for distinguishing this Court's exercise of authority in one area of *Griffith-Teague* retroactivity from another. This Court's retroactivity doctrine applies independently of federal habeas, the supervisory authority of this Court, and the law of remedies. *Griffith-Teague* retroactivity doctrine exists separately because it is essential to vindicate federal interests of constitutional supremacy and uniformity, judicial finality, and federalism. As to supremacy, it is fundamental that a single sovereign's law must be applied equally to all. Thus, this Court has recognized the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Allowing states to selectively create certain preferred federal constitutional rights in the name of the federal constitution will mean similarly situated citizens of different states will be treated differently with regard to the same federal constitutional provisions.

If the *Griffith-Teague* retroactivity doctrine did not apply in state courts, supremacy and uniformity problems would be magnified because federal review of state post-conviction proceedings – in both habeas proceedings and direct review by this Court – would be unavailable for decisions that do not follow *Teague*. The lack of federal review deprives the state decision of constitutional legitimacy. Even if not *Teague* barred, this Court's review would ratify state created federal constitutional disparity into its decisions by reviewing the claims of similarly situated

collateral review defendants according to different constitutional standards.

The *Griffith-Teague* doctrine also vindicates federal constitutional values of finality and federalism. Finality interests identified in *Teague* are not unique to federal habeas review. They are present and protected by *Teague* in the context of federal collateral review of federal convictions as well as in review by this Court of federal issues arising in state collateral proceedings. *Teague* also serves the comity interest of validating the reasonable interpretation of existing federal constitutional rules made by state courts – an interest not limited to the federal habeas context. Whether a federal or state judge asserts a new federal constitutional rule to invalidate a reasonable state court interpretation of a federal constitutional rule the state finality interest is subverted.

Against strong supremacy, judicial integrity, finality, and federalism values, Petitioner asserts a state interest in selectively creating enhanced or preferred federal constitutional rights that apply only to citizens of that state. This is not a legitimate state interest. If a state wishes to create preferred rights for its citizens, respect for the political rights of the citizens of the state require a state do so under its own state law subject to the state legal and political constraints attendant to state law decisions. Anything less simply cloaks state law decisions under an illegitimately claimed federal authority for the purpose of avoiding accountability to state citizens.

ARGUMENT

I. THIS COURT'S DECISIONS DEFINING THE RETROACTIVITY OF FEDERAL CONSTITUTIONAL RIGHTS ARE BINDING ON STATE COURTS APPLYING THOSE CONSTITUTIONAL RIGHTS.

Article III of the United States Constitution establishes a "judicial department with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Article III also gives "the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, . . . with an understanding, in short, that a 'judgment conclusively resolves the case because a "judicial power" is one to render dispositive judgments'." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (citing Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

At its most basic level, a retroactivity decision is implicit in every decision this Court announces because this Court's ruling and judgment impact events that occurred well before this Court issued its opinion. Thus, the concept of retroactivity is inherent in the judicial decisionmaking process. When this Court decides whether or not to apply a new federal rule in a particular case (*i.e.* makes a retroactivity decision), it is fulfilling its duty to "say what the law is" and render a dispositive judgment in a given case.

In *Griffith* and *Teague*, this Court was asked to decide whether the defendants were entitled to the benefit of new federal constitutional rulings. This Court's answers were exercises of this Court's Article III powers to resolve cases presenting justiciable federal questions. This Court did not

merely announce the "outcome" of a discrete case but also established the "mode of analysis" that this Court would follow when considering retroactivity questions in the future. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). Like the individual outcomes, the *Griffith-Teague* retroactivity framework was an exercise of this Court's power to "say what the law is."

With surprisingly little explanation, Petitioner singles out a small corner of this Court's retroactivity jurisprudence and fastens to it various labels like "policy," "methodology," and "remedy" in the vain hope that the label will be sufficient to allow states to selectively create alternate federal rights valid only in the state of creation. The effort is unavailing. This Court's principles for determining the retroactivity of a new federal constitutional rule, including those announced in *Griffith* and *Teague*, have consistently applied outside of the federal habeas context and to the states.

Until *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court generally adhered to a "Blackstonian" view that new rules completely replaced old rules and were to be applied retroactively. *Id.* at 622-23.[4] In *Linkletter*, this Court

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[4] The issue of federal constitutional retroactivity on collateral review, rarely arose before the 1960's. Until 1867, the Judiciary Act of 1789 limited federal collateral relief to prisoners detained by federal authority. *Wainwright v. Sykes*, 433 U.S. 72, 77-78 (1977). In 1867, Congress extended federal collateral review to persons held in state custody. *Id.* at 78. After 1867, federal collateral review of state court judgments focused, at least in theory, on claims that the state court lacked jurisdiction. *Id.* In *Brown v. Allen*, 344 U.S. 443 (1953), the Court made clear that dispositive federal constitutional law issues could be subject to federal collateral review. *Id.* Thus, prior to *Brown*, federal habeas review of state convictions on the basis of substantive federal constitutional law was relatively rare. *See Desist v. United*

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rejected principles of specific application and said it would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629.

Although *Linkletter* involved federal habeas review, this Court later applied *Linkletter* in reviewing state court decisions involving the retroactivity of federal constitutional rulings on criminal collateral review. *See Kitchens v. Smith*, 401 U.S. 847, 848 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3 (1968); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam); *DeStefano v. Woods*, 392 U.S. 631, 632 (1968); *Witherspoon v. Illinois*, 391 U.S. 510, 513 (1968); *Johnson v. New Jersey*, 384 U.S. 719, 726 (1966). Thus, the *Linkletter* standard was binding on state courts conducting criminal collateral review.

Linkletter posed difficulties in application. *See, e.g., United States v. Johnson*, 457 U.S. 537, 546 n. 9 (1982) (collecting opinions of members of the Court arguing against "selective awards of retroactivity."). In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court began to abandon *Linkletter* in favor of more specific principles of general applicability. *Griffith* resolves two cases on direct appeal. One was a state court conviction and the other a federal court conviction. The Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on

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States, 394 U.S. 244, 260-61 (1969) (J. Harlan, dissenting). In addition, before *Case v. Nebraska*, 381 U.S. 336 (1965), few states provided meaningful state collateral review proceedings in which federal constitutional issues could be litigated. *See generally*, Larry Yackle, *Postconviction Remedies*, section I at pages 1-3 (1981).

direct review or not yet final." *Id.* at 328. The Court concluded that refusal to apply a new rule to similarly situated defendants with cases pending on appeal "violates basic norms of constitutional adjudication" and "the integrity of judicial review." *Id.* at 322. *Griffith* made explicit what was implicit after *Linkletter*. This Court's retroactivity principles are binding on state courts deciding the retroactivity of federal constitutional rules.

A year after *Griffith*, this Court turned from non-final to final cases. In *Yates v. Aiken*, 484 U.S. 211 (1988), petitioner brought a state collateral challenge to his final conviction, arguing that a burden shifting instruction violated both state and federal constitutional law. Reversing the state postconviction ruling, this Court, presaging *Teague*, and in fact creating an essential part of *Teague*, found constitutional rulings that are not "new" are to be given retroactive effect.[5] Importantly, South Carolina argued in *Yates* that it had authority to establish the scope of its own collateral review proceedings in which it could "refuse to apply a new rule of federal constitutional law retroactively in such a proceeding." *Id.* at 217. This Court rejected that view and found South Carolina had "a duty to grant the relief that federal law requires." *Id.* at 218.[6]

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[5] Later cases of this Court have refined the concept of "new rule" with the effect of narrowing the class of cases on collateral review in which a ruling of this Court will apply retroactively. *See, e.g., Butler v. McKellar*, 494 U.S. 407, 414 (1990); *Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Under Petitioner's view of "constitutional floors, not ceilings," states would be free to ignore the *McKellar* line of cases defining "new rules" in preference to a broader view offering far greater retroactive application. Such a view is contrary to both *Yates* and *Teague*.

[6] This ruling is, of course, wholly incompatible with the position advanced in the brief of Kansas and the Amici States in Support of

(Continued on following page)

Thus, *Yates* required state courts to follow federal retroactivity decisions when determining federal constitutional issues in state postconviction proceedings.

A year later, in *Teague v. Lane*, 489 U.S. 288 (1989), this Court completed the retroactivity framework begun in *Griffith* and *Yates*. In a plurality opinion that was ultimately adopted by a majority, *see Penry v. Lynaugh*, 492 U.S. 302, 328-30 (1989), this Court criticized *Linkletter* because it led to "unfortunate disparity in the treatment of similarly situated defendants on collateral review" and failed to "account for the nature and function of collateral review." *Teague*, 489 U.S. at 305.[7] As to "the nature and

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Neither Party that because states have no obligation to provide either direct or postconviction review, they are free to disregard federal retroactivity doctrine in the postconviction area. Yet, as to direct review, *Griffith* could not be more clear in requiring states that do provide direct appellate rights to apply this Court's constitutional decisions retroactively. Moreover, quite apart from *Yates'* rejection of the same argument, Amici states do not explain why direct appellate review and postconviction review should be treated differently. In both instances, when a state "has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 218.

[7] Petitioner contends that the language in *Teague* and its progeny proves that the rule is limited to federal habeas cases. While *Teague* often refers to habeas review and discusses the purposes of the writ, it also speaks in more general terms of "collateral review." *Teague*, 489 U.S. at 306-08. The focus of *Teague* was not habeas specifically, but rather "the important distinction between direct review and collateral review." *Id.* at 308 (quoting *Yates v. Aiken*, 484 U.S. at 215). To buttress this point, this Court cited to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) – a case involving state collateral review. *Teague*, 489 U.S. at 307. The reference to federal habeas in *Teague* and later cases is unremarkable. The federal habeas statute is the vehicle federal courts use to entertain collateral challenges to state court convictions. *Teague* was a federal habeas case as are nearly all of the collateral review cases this Court decides. *Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079,

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function of collateral review," this Court relied upon the finality "interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision." *Id.* at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (J. Harlan, concurring in part and dissenting in part)). Thus this Court concluded "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system" and held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 309-310.

Teague has two exceptions. The first applies to new rules which place "certain kinds of conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (quoting *Mackey*, 401 U.S. at 692 (J. Harlan, concurring in part and dissenting in part)). The second applies to "watershed rules" "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313; *see also, e.g., Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Teague and *Yates* announced the standards for determining the retroactivity of new federal rules on collateral review. *Teague* principles apply not just in federal habeas proceedings, but also on state collateral review. *See, e.g., Yates*, 484 U.S. at 217-18 (reversing state court on new

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1084 (2007). In later decisions, this Court recognized that *Teague* is not just an expression of deference to state court judgments but sets out a broader "nonretroactivity principle." *Wright v. West*, 505 U.S. 277, 307 (1992) (J. Kennedy, concurring).

rule ground); *Roper v. Simmons*, 543 U.S. 551 (2005) (announcing new Eighth Amendment rule retroactively applied in state collateral proceeding); *Kitchens v. Smith*, 401 U.S. 847 (1971) (retroactively applying *Gideon v. Wainwright*, a "watershed rule" to state collateral review); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (same).[8] To be certain, if a rule is not "new" or falls within a *Teague* exception, state courts must retroactively apply the federal rule on collateral review, but nothing in this Court's retroactivity doctrine suggests it binds states only if the result would benefit defendants. *See Michigan v. Payne*, 412 U.S. 47 (1973) (reversing state court decision applying new rule retroactively). The question whether *Teague* applies to state collateral review proceedings has already been answered by this Court in the context of its new rule requirement and exceptions.

After *Teague*, this Court confirmed that federal retroactivity standards are binding on state courts applying new federal constitutional rules. In *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), a plurality of this Court found retroactivity of a federal constitutional decision "is a matter of federal law" and that this Court had "consistently required that state courts adhere to this Court's retroactivity decisions." *Id.* at 177-78. The plurality rejected the dissent's view that retroactivity is only remedial saying, "this Court's retroactivity decisions, whether in the civil or criminal sphere, [do not] support

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[8] The NACDL contends the *Teague* exceptions are binding upon the states because they are based on separate due process concerns. *See* NACDL Amicus brief at 28 n. 5. Yet, this Court has said that watershed rules are distinct from due process requirements. *See Tyler v. Cain*, 533 U.S. 656, 667 n. 7 (2001).

the dissent's assertion that our retroactivity doctrine is a remedial principle." *Id.* at 194.

More recently, in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), a majority adopted the *Griffith-Teague* framework for civil cases. This Court reconfirmed that:

> The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law.

Harper, 509 U.S. at 100. This Court also reconfirmed that retroactivity is not a choice of remedy. *Id.* at 100-101.

Although this Court's retroactivity standard has evolved from *Linkletter*'s balancing test to *Griffith-Teague*'s more principled framework, this Court's decisions have uniformly asserted federal control over the retroactivity of federal rights. From *Linkletter*, to *Griffith*, to *Yates*, to *Teague*, to *Harper*, this Court has consistently required state courts to apply this Court's cases in determining the retroactivity of federal constitutional rulings.

Petitioner and Amici offer no sound reason why this Court's authority to enforce a retroactivity decision in one context would be different from its authority to do so in another. The authority underlying *Griffith*, *Teague*, *Teague*'s new rule requirement, and *Teague*'s exceptions (and the binding nature of the decisions on state courts) is, and should be, the same because the decisions together form a complete and coherent set of retroactivity principles. For example,

Teague's exceptions (which Petitioner and Amici agree states must follow) are meaningless if a state is free to disregard *Teague*'s general rule and can treat all cases as if they were "exceptions." This Court's retroactivity doctrine represents a careful and complete approach. Exempting states from one aspect of the equation renders the whole meaningless.

Despite this Court's repeated statements that federal retroactivity doctrine controls state applications of federal constitutional decisions, Petitioner grasps for labels suggesting alternative and non-binding sources of authority for retroactivity doctrine like an overboard sailor desperately seeking anything that might float. None of the labels has buoyancy.

First, this Court's retroactivity doctrine does not rest on the federal habeas statute. As this Court has said, retroactivity doctrine is about choosing the law, "old" or "new," that applies to a given case. That choice of law is distinct from federal habeas inquiry. *See Horn v. Banks*, 536 U.S. 266, 272 (2002) ("if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct.") (citing *Tyler v. Cain*, 533 U.S. 656, 669-670 (2001) (J. O'Connor, concurring) and *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000); *see also Wright v. West*, 505 U.S. 277, 291 n. 8, 303-304 (1992) (J. O'Connor, concurring). Federal retroactivity doctrine cannot be explained as an interpretation of the federal habeas statute because the federal habeas statute in effect at the time *Griffith* and *Teague* were announced provided no textual support for the substance of the principles this Court adopted. *See* 28 U.S.C. § 2254 (1966), current version at 28 U.S.C. § 2254 (1996). Federal habeas and retroactivity are distinct inquiries.

Second, this Court's retroactivity doctrine does not rest on the supervisory powers of this Court. If this Court's retroactivity doctrine were so limited, *Griffith*, the *Teague* new rule requirement, and the *Teague* exceptions, *American Trucking*, and *Harper* would not be binding on the states. Moreover, *Teague* cannot be an exercise of supervisory powers because this Court could not use its supervisory authority to limit a constitutional rule like *Griffith*. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) ("[i]t is well established that '[e]ven a sensible and efficient use of supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.'").

Finally, retroactivity doctrine is distinct from the question of remedy. This Court has repeatedly said that retroactivity is independent of the question as to what remedy might be available under applicable law. *See Harper*, 509 U.S. at 99-102 (distinguishing remedial limitations from retroactivity); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("The *Teague* doctrine, however, does not involve a special 'remedial' limitation on the principle of 'retroactivity' as much as it reflects a limitation inherent in the principle itself."); *American Trucking*, 496 U.S. at 194 ("this Court's retroactivity decisions, whether in the civil or criminal sphere, [do not] support the dissent's assertion that our retroactivity doctrine is a remedial principle.").

This Court's retroactivity doctrine, including the principles set out in *Griffith* and *Teague*, can only be understood under this Court's cases as an exercise of binding federal authority over the reach of its federal constitutional rulings.

II. *GRIFFITH-TEAGUE* IS BINDING FEDERAL AUTHORITY BECAUSE IT IS ESSENTIAL TO VINDICATE PRINCIPLES OF SUPREMACY, JUDICIAL INTEGRITY, FINALITY AND FEDERALISM.

This Court has applied the *Griffith-Teague* retroactivity doctrine to the states because it is essential to vindicate principles of supremacy, judicial integrity, finality, and federalism.

A. Supremacy and Judicial Integrity.

Requiring states to apply *Griffith-Teague* retroactivity is essential to federal constitutional supremacy and uniformity. Allowing states to selectively create certain preferred rights in the name of the federal constitution will mean similarly situated citizens of different states will be treated differently with regard to the same textual provisions of the federal constitution. Although Petitioner's Brief is notably silent in this regard, the authorities he relies upon concede this point. *See* Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 447-48 (1993) (observing that state court "experimentation" with new federal rules in state collateral proceedings would give rise to "serious complications." In particular, the uniform application of rights will "disappear."); *Smart v. State*, 146 P.3d 15, 26 (Alaska Ct. App. 2006) *rev. granted* (Feb. 2007) ("It is true that if the states have different retroactivity rules, defendants seeking postconviction relief under state law will meet with different results [as a matter of federal law,] depending on which state law governs their litigation.").

This Court has long recognized the "necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-348 (1816). "The goal of national uniformity rests on a fundamental principle: that a single sovereign's law should be applied equally to all. . . ." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 4 (1985). If supremacy means anything, state courts may not substitute their own judgments for those of this Court as to retroactivity. *See*, *Harper*, 509 U.S. at 100 ("The Supremacy Clause, U.S. Const. Art VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law."); *American Trucking*, 496 U.S. at 178 (the Court has "consistently required that state courts adhere to our retroactivity decisions" "to ensure the uniform application of decisions construing constitutional requirements.").

Requiring *Griffith-Teague* to control in state as well as federal collateral review vindicates the principle that constitutional decisions must be applied in a uniform fashion to similarly-situated people. "[S]tate courts handle the vast bulk of all criminal litigation in this country." *Michigan v. Long*, 463 U.S. 1032, 1042 n. 8 (1983). In 2004, there were more than 20 million criminal cases filed. Court Statistics Project, *State Court Caseload Statistics, 2005* (National Center for State Courts 2006), Table 1. "The state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process." *Long*, 463 U.S. at 1042 n. 8. With millions of state criminal cases and the limited ability of this Court to review those cases, the task of achieving clarity and uniformity in federal constitutional

decisions will be extremely difficult if states are free to disregard federal retroactivity standards and to selectively create certain preferred federal constitutional rights good only in a single state.

For example, if *Whorton v. Bockting* is not binding precedent, the Minnesota Supreme Court may decide to apply it or not, just like each of the forty-nine other states. In *Whorton*'s stead, the Minnesota Supreme Court may apply a *Linkletter*-like analysis (which this Court has discarded). It may ignore *Griffith* and simply apply *Crawford* to all judgments final and non-final alike. It may accept *Teague*'s framework, but adopt a more liberal construction of what "new" rules are thereby rejecting this Court's decisions in *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); *Graham v. Collins*, 506 U.S. 461 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Caspari v. Bohlen*, 510 U.S. 383 (1994); and *Lambrix v. Singletary*, 520 U.S. 518 (1997). It may adopt different constructions of *Teague*'s exceptions. It could ignore this Court's decision in *Whorton*, and find *Crawford* is a "watershed" rule. It may purport to apply the precise test in *Teague* but simply come to a different conclusion from *Whorton*. All the while, Minnesota would be claiming to apply the same Sixth Amendment as each of the other forty-nine states.[9]

The problem is real. For example, the Alaska Court of Appeals has held that it is not bound by *Teague* and has

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[9] These examples are not, by any means exhaustive. Under Petitioner's view, a state could, for example, declare that this Court's federal constitutional rulings would apply retroactively only if fewer than ten prisoners of that state would be entitled to postconviction relief.

ruled that the Sixth Amendment rights announced in *Blakely v. Washington*, 542 U.S. 296 (2004) will be applied retroactively on state collateral review. *Smart*, 146 P.3d at 27. In contrast, Minnesota prisoners whose convictions are final will not be resentenced. *See State v. Houston*. 702 N.W.2d 268, 273 (Minn. 2005); death penalty defendants on collateral review in Missouri will have *Ring v. Arizona*, 536 U.S. 584 (2002) applied to their cases, *Whitfield v. State*, 107 S.W.3d 253, 268 (Mo. 2003); while similarly situated death penalty defendants in Idaho will not. *Hairston v. State*, 156 P.3d 552, 559 (Idaho 2007). The problem will be compounded with each new federal constitutional rule this Court announced.

Uniformity problems would be magnified under the system Petitioner advocates because state court decisions in non-*Teague* jurisdictions would be effectively shielded from federal review. For example, if *Whorton* were not binding, the Minnesota Supreme Court could choose to apply *Crawford* retroactively on the ground that, in Petitioner's case, it changes only the rationale and not the result. *Cf. Crawford*, 541 U.S. at 60. The Minnesota court would, therefore, rule the videotaped statement of the six-year-old sex abuse victim is not testimonial and is admissible. *See State v. Krasky*, A04-2011, 2007 WL 2264711 (Minn. August 9, 2007) (videotaped statement of incompetent six year old victim of child sexual abuse is non-testimonial and admissible under *Crawford* and *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266 (2006)); *see also State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006) (out of court statements of child victim made to medical professional were non-testimonial); *State v. Scacchetti*, 711 N.W.2d 508 (Minn.

2006) (same).[10] If Petitioner filed a petition for a writ of habeas corpus in federal court challenging the state court's ruling, his claim would be barred under *Teague*. *See Horn v. Banks*, 536 U.S. 266, 271 (2002) (*Banks I*); *Nunley v. Bowersox*, 394 F.3d 1079, 1081 (8th Cir. 2005) (applying *Teague* to bar Missouri defendant's claim despite the fact that state court, ignoring *Teague*, applied new rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002) retroactively to other defendants on state collateral review).

Federal habeas corpus proceedings are the nearly exclusive means of federal court review of state court decisions. *Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1084 (2007) (noting this Court "rarely" takes cases directly from state collateral review preferring instead to wait until the case has been litigated in a federal habeas proceeding). In 2004, state prisoners filed 23,569 habeas petitions in federal district court. The same year, this Court reviewed one case on direct appeal from a state collateral proceeding. *See* Leonidas Ralph Meeham, *Administrative Office of the United States Courts, 2005 Annual Report of the Director*, Table C-2A (*available at* http://www.uscourts.gov/judbus2005/appendices/c2a.pdf); *The Supreme Court, 2004 Term: The Statistics*, 119 Harv. L. Rev. 415, 428 (2005). If *Teague* is not binding on the states, federal habeas review, the nearly exclusive and preferred means of federal court review, will be unavailable for state court

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[10] The statement of Amicus NACDL that no one would deny Petitioner's "Confrontation Clause rights were, in fact, violated by the admission of the videotaped statement against him," NACDL brief at 24, is wrong on at least two fronts. First, the whole point of *Griffith-Teague* is that Petitioner's confrontation clause rights must be determined in reference to the time his conviction became final. More ironically, the Minnesota Supreme Court disagrees with the NACDL position even in the context of applying *Crawford* to Petitioner's case.

rulings declining to follow *Teague* and issuing interpretations of new federal constitutional rulings.

If Petitioner sought review in this Court directly from the Minnesota Supreme Court's ruling, the result would be equally problematic. Since application of this Court's retroactivity doctrine and federal habeas are distinct inquiries, *see supra* at 16, *Teague* would apply independent of federal habeas review to bar this Court's review of the state court's decision, and Minnesota's decision that the videotape is admissible would stand.[11] Yet, as this Court has recognized, the values of uniformity and comity are undercut when a state court's federal constitutional ruling is not subject to federal review. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 623 (1989) (noting that state court rulings not subject to review are deprived of legitimacy). Even if this Court were to ignore *Teague* and accept review, this Court would necessarily ratify state created disparities on matters of federal constitutional law among

[11] If *Teague* did not bar review in this Court, review would likely be barred anyway because this Court could not reverse on the question of the admissibility of the videotape without also reversing the basis for the Minnesota Supreme Court's retroactivity ruling. They are dependent. As a result, the ruling would be advisory, because this Court could not require the Minnesota Supreme Court to retroactively apply *Crawford*. The larger point the example illustrates is the difficulty with Amicus ACLU's suggestion that retroactivity questions arise independently from constitutional rulings. ACLU brief at 5 n. 2. As to this point, first, if this Court's retroactivity principles are not controlling, states remain free to adopt retroactivity rulings in a case-by-case manner that are fully dependent upon nature and substance of the constitutional ruling at issue. Second, the argument does not account for *Griffith*, in that *Griffith* is binding on the states yet is completely independent of the nature of the constitutional ruling at issue. Third, *Teague*, with its "new rule" and exceptions, is fully dependent on the nature of the constitutional ruling at issue.

similarly situated collateral review defendants. Thus, if this Court were to review the Missouri court's judgment in *Whitfield* and the Idaho court's judgment in *Hairston*, it would have to apply different law to similarly situated defendants even though both defendants' claims "arise under" the same constitutional provision and in the same procedural posture.[12]

Petitioner asks this Court to dramatically extend state court authority to interpret the federal constitution. Petitioner also asks this Court to do so in a way in which those interpretations are largely shielded from federal court review. Both ideas are bad. The combination is intolerable. Requiring state courts to follow *Teague* in resolving federal constitutional issues on collateral review is essential. *Teague* is, in this sense, an instrument of federal constitutional supremacy and uniformity.[13] Similarly situated

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[12] Sanctioning disparate federal rights between similarly situated defendants in different states will also open the door to due process claims. Once the state courts in one state grant retroactive benefit of a new federal rule to its defendants, similarly situated defendants in other states will argue that they are entitled to the benefit. *Cf. Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir. 1990) (holding State of California violated federal equal protection clause by applying new state constitutional rule to one defendant while denying retroactive benefit to a similarly situated defendant); *Williams v. Armantrout*, 891 F.2d 656, 659-660 (8th Cir. 1989), *vacated on other grounds*, 912 F.2d 924 (8th Cir. 1990) (holding State of Missouri violated federal equal protection clause by applying new state constitutional rule in an uneven manner to similarly situated defendants).

[13] Under *Teague*, if a new rule is created and applied to the defendant on collateral review, "the ideal of the 'administration of justice with an even hand'" requires it to apply "to all others similarly situated" *Teague*, 489 U.S. at 315-316. That is why *Teague* refuses to announce a new rule in cases on collateral review, unless the rule fits within one of the two narrow exceptions authorizing retroactive

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defendants in different states should not have different federal constitutional rights, when these rights are dependent upon the same textual provisions. As Justice Scalia wrote in a different context, "turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt." *Kansas v. Marsh*, ___ U.S. ___, 126 S. Ct. 2516, 2531 (2006) (concurring). The federal constitution should not vary depending on the state in which it is applied.

B. Finality-Federalism.

Finality is an inherent component of, and essential to, the functioning of the American judicial system. *See Spendthrift Farms*, 514 U.S. at 227 (observing "a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed) is implicit" in Article III). *Teague*'s general rule vindicates finality by limiting those instances in which federal constitutional rules may be applied to disturb final criminal judgments on collateral review. In explaining why *retroactivity* must be different on collateral review of final convictions, Justice Harlan said it is "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process." *Williams v. United States*, 401 U.S. 676, 690 (1971) (J. Harlan, concurring in part and dissenting in part).

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application to all defendants on collateral review. *Teague*, 489 U.S. at 316.

> If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Id. at 691. Justice Harlan pointed out that failing to take account of finality interests seriously distorts the limited resources society has allocated to the criminal process noting "it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final." *Id.* Justice Harlan argued that distortion of resources is compounded by the fact that relitigating old cases necessarily involves trying stale facts through witnesses whose memories have often dimmed, "ironically" producing "a second trial no more reliable as a matter of getting at the truth than the first." *Id.*

Against these interests, Justice Harlan weighed the purported benefits of applying a new constitutional rule on collateral review and found them "overstated." *Id.* at 689. He said:

> Some discrimination must always exist in the legal treatment of criminal convicts within a system where the governing law is continuously

> subject to change. And it has been the law, presumably for at least as long as anyone currently in jail has been incarcerated, that procedures utilized to convict them must have been fundamentally fair . . . Moreover, it is too easy to suggest that constitutional updating is necessary in order to assure that the system arrives at only "correct" results. By hypothesis, a final conviction, state or federal, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it. To argue that one of these "inferior" courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force.

Id. at 689-690. This Court endorsed Justice Harlan's views on finality in *Griffith* and *Teague*. *See Griffith*, 479 U.S. at 322-24; *Teague*, 489 U.S. at 303-10.

The *Griffith-Teague* framework recognizes the fundamental distinction between final and non-final convictions. Under *Griffith*, new rules are applied to pending cases, state or federal, because respect for final judicial decisions is not implicated. Under *Teague*'s general rule, the interest in leaving final convictions, in a state of repose is recognized, in part, for reasons relating to respect for the final judgments of courts, state or federal. It is an interest independent of comity. If this were not the case, federal courts would not apply *Teague* in collateral attacks on federal convictions under 28 U.S.C. § 2255. Yet, every circuit court that has considered the issue has held that *Teague* applies collateral attacks on federal cases as well

as state court cases.[11] In this sense, *Teague* is not solely an expression of deference to state court judgments. It recognizes a value in the integrity of final judgments that is not dependent on forum.

Teague also promotes federalism by vindicating the states' interests in the finality of its properly obtained convictions. As this Court said in *Teague*:

> In many ways, the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions. *Cf. Younger v. Harris*, 401 U.S. 37, 43-54, 91 S. Ct. 746, 750-55, 27 L.Ed. 669 (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court

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[11] *See, e.g., Gilberti v. United States*, 917 F.2d 92, 94-95 (2d Cir. 1990); *United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998); *Van Daalwyk v. United States*, 21 F.3d 179, 182-83 (7th Cir. 1994); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 (9th Cir. 2002); *Daniels v. United States*, 254 F.3d 1180, 1194 (10th Cir. 2001) (en banc); *United States v. Swindall*, 107 F.3d 831, 834 n. 4 (11th Cir. 1997) (per curiam); *see also, e.g., Sepulveda v. United States*, 330 F.3d 55, 66 (1st Cir. 2003) (assuming *Teague* applies to Section 2255 claims); *United States v. Swinton*, 333 F.3d 481, 487-88 (3d Cir. 2003) (same); *United States v. Brown*, 305 F.3d 304, 307 (5th Cir. 2002) (per curiam) (same); *Lang v. United States*, 474 F.3d 348, 354 n. 8 (6th Cir. 2007) (same); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001) (same); *United States v. Ayala*, 894 F.2d 425, 429 n. 8 (D.C. Cir. 1990) (same). In addition, this Court has applied an exception to *Teague* in a Section 2255 proceeding without any suggestion that *Teague* does not apply in that context. *See Bousely v. United States*, 523 U.S. 614 (1998).

> discover during a [habeas] proceeding, new constitutional commands."

Id. at 310; *see also Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (purpose of *Teague* is to promote the finality of state court judgments); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (new rule principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

Importantly, both finality and comity interests are involved whether a federal or state court undertakes the task of applying federal constitutional rules to collateral review of final state judgments. In both instances, the question is not what state law requires, it is what the federal constitution requires. Missing this point, Petitioner argues that a state court's decision regarding retroactivity of federal constitutional rules reflects some unique and unidentified state interest and is entitled to respect, indeed complete deference, by this Court. Yet, a state court determines federal interests, not unique state interests, by applying a federal constitutional rule.

Thus, in *Beard v. Banks*, 542 U.S. 406 (2004) (*Banks II*), defendant argued the Pennsylvania Supreme Court's practice of declining to apply waiver principles to capital cases rendered convictions nonfinal and therefore outside of *Teague*'s dictates. This Court disagreed, stating that the argument "reflects a fundamental misunderstanding" of "*Teague*'s nonretroactivity principle." *Id.* at 412. The Court observed *Teague* "protects not only the reasonable judgments of state courts but also the State's interest in finality quite apart from their courts." *Id.* at 413. *Cf. also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (reversing

circuit court's recall of mandate denying habeas relief where recall failed to vindicate finality "shared by the State and the victims of crime" alike). Whether a state court may be willing to forego the protection accorded to its reasonable judgment as a matter of state law, the state court cannot eclipse the shared federal and State's (of its citizens and executive branch) interest in the finality of a fairly obtained conviction.

Teague protects finality and comity even in the face of a state court willing to discount these interests. It does so because a state court applying a federal law is not acting as an agent loyal only to a state. For example, a state court deciding whether a commerce clause ruling of this Court applies retroactivity to invalidate a state tax is not free to choose the federal constitutional ruling imposing the least fiscal burden on state residents. The judge, regardless of state interest, is obligated to follow this Court's retroactivity doctrine. *See American Trucking*, 496 U.S. at 177; *Harper*, 509 U.S. at 100.[15] At bottom, whether

[15] Petitioner asserts *Teague* cannot be binding on state courts because *Teague* can be waived or forfeited by the government. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Schriro v. Summerlin*, 510 U.S. 222, 228 (1994); *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990). That *Teague* can be waived is unrelated to its status as binding federal authority. *Bohlen*, *Schriro* and *Youngblood* simply recognize the quite unremarkable proposition that *Teague*, like many other constitutional provisions, is subject to waiver by a party. *See Peretz v. United States*, 501 U.S. 923, 936 (1991) (holding that a defendant can waive any right to have an Article III judge preside over jury selection by failing to assert the claim in a timely fashion. As this Court has observed, "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right." *Id.*, 501 U.S. at 936-37 (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944)). Moreover, it is quite a leap to infer from a party's ability to waive a defense, that a state court judge, sworn to uphold the federal constitution, may do so

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one views *Teague* as a limitation on judges (state or federal) who, in the name of the federal constitution, wish to upset final convictions, or as a positive command to apply the federal law at the time the conviction became final, the result is the same. New federal constitutional rules that do not fall within *Teague*'s narrow exceptions, are not to be used to upset the finality of state court convictions.

If a state court deviates from *Teague*, it grants relief that is not required under federal law and is inconsistent with the federal and state interests identified by Justice Harlan and in *Griffith*, *Teague*, and their progeny. Unlike

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without consent. Finally, *Youngblood* contradicts Petitioner's claim that *Teague* is not a constitutionally-based defense. In support of its conclusion that *Teague* is not "'jurisdictional' in the sense that this Court, . . . *must* raise and decide the issue *sua sponte*," this Court compared *Teague* to the Eleventh Amendment sovereign immunity defense waived in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515 n. 19 (1982). *Youngblood*, 497 U.S. at 41.

Notably, even in instances where the Court has declined to apply *Teague*, the results reached by this Court are consistent with *Teague*'s essential mandates. None of the decisions announced a "new rule" or extended existing precedent to overturn a final conviction on collateral review. *See Godinez v. Moran*, 509 U.S. 389, 397 (1993) (rejecting court of appeals' extension of Supreme Court precedent regarding the competence requirement for pleading guilty and waiving counsel and reversing grant of writ); *Parke v. Raley*, 506 U.S. 20, 37 (1992) (reversing court of appeals' issuance of writ where court applied a circuit rule, announced after conviction was final, that changed the burden of establishing the validity of a conviction used to enhance a sentence); *Schriro*, 510 U.S. at 231-32, 114 S. Ct. at 790 (refusing to grant collateral relief where defendant claimed that sentencing phase in capital case was "successive prosecution" and that death sentence imposed violated Double Jeopardy Clause); *Youngblood*, 497 U.S. at 52 (refusing to collateral relief where defendant claimed that state statute that allowed reformation of improper verdicts violated Ex Post Facto Clause).

a state court applying state law and vindicating a state interest, a state court applying a federal constitutional rule is vindicating federal interests. In the case of *Teague*, supremacy, uniformity, judicial integrity, finality, and federalism require keeping new federal constitutional rules from upsetting final state court judgments.

III. IF A STATE WISHES TO SELECTIVELY CREATE PREFERRED OR ENHANCED RIGHTS FOR ITS CITIZENS, FEDERALISM AND STATES RIGHTS REQUIRE STATES TO DO SO UNDER STATE LAW THAT IS SUBJECT TO THE LEGAL AND POLITICAL CONSTRAINTS ATTENDANT TO STATE LAW DECISIONS.

States have no legitimate interest in creating federal constitutional rights that apply only to citizens of their own state. Yet, through his "floors and ceilings" approach Petitioner asserts just such a state interest. If a state wishes to selectively create enhanced rights, good only for citizens of that state, federalism and respect for the political rights of the citizens of the state require that a state do so under its own state law subject to the constraints attendant to state law decisions.

Not surprisingly, this Court has already rejected the notion that states are free to disregard the rulings of this Court while striking out to create federal constitutional rules good only for citizens of their own state. In *Oregon v. Hass*, 420 U.S. 714 (1975), the defendant was convicted after his non-*Mirandized* and voluntary statement was admitted for impeachment purposes. Admitting the statement was consistent with *Harris v. New York*, 401 U.S. 222 (1971). On appeal, the Oregon Supreme Court, disagreed with *Harris* and ruled that, as a matter of

federal constitutional law, such statements could not be used for impeachment purposes. *Hass*, 420 U.S. at 718-19. On appeal to this Court, the defendant raised the same "floors and ceilings" argument Petitioner raises in this case.

Rejecting the argument, this Court addressed two propositions the Oregon Supreme Court had asserted. The first was that Oregon could interpret its own state constitution as affording individuals broader rights under the Oregon State Constitution than are provided by the Fourth Amendment. This Court said the proposition "is, of course, good law." *Id.*, 420 U.S. at 719 n. 4. The second proposition was that the Oregon courts can interpret the Fourth Amendment of the federal constitution as affording individuals broader rights than the federal constitution as set out by this Court. This Court said this proposition was "unsupported by any cited authority, is not the law and surely must be an inadvertent error; in any event, we reject it." *Id.* States are not free to ignore this Court's rulings with respect to the contours of federal rights while purporting to rely on those same federal rights as a source of authority.[16]

Hass is fully consistent with the view that states should serve as laboratories of experimentation for legal doctrine. The proposition that as a matter of state law, a state may afford greater rights "is, of course, good law."

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[16] Ironically, Professor Tribe has described *Hass* as rejecting Petitioner's argument in the very same terms Petitioner chooses. He wrote that under *Hass* "[s]tate courts were thereby compelled to treat the federal Constitution as setting both a ceiling and a floor on the extent of protection that can be accorded in its name." Laurence H. Tribe, *American Constitutional Law* 263 (3rd ed. 2000).

Hass, 420 U.S. at 719 n. 4. *Hass* just says that, in running the laboratory, states may not use the United States Constitution as a lab rat. There are good reasons for declaring the federal constitution off-limits for experimentation. First, the notion runs head on into federal constitutional supremacy and uniformity. *See supra* at 18-25.[17] Second, as Professor Tribe has noted, "it seems clear that the *Hass* rule serves more to advance than to retard responsible constitutional decisionmaking. . . . if the state court's interpretation of federal law in *Hass* had remained in place, it could not have been overturned through that state's political processes." Laurence H. Tribe, *American Constitutional Law* 263 (3rd ed. 2000).[18] Requiring states to use state law when granting the citizens of their own states broader individual rights than those provided by the federal constitution, serves not only the interest of federal uniformity, but also the proper regard for the political rights of the citizens of the affected state. It does so by requiring state courts to subject decisions affording broader individual rights than the federal constitution to state political and legal processes. Put another way, a state court should be fully politically and legally accountable for its decisions when those decisions do not rest upon the federal constitutional views of this Court.

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[17] Moreover, even absent the Supremacy argument (something that is difficult to ignore) as a practical matter, with limited review capacity, this Court is ill-suited to supervise a federal constitutional laboratory with fifty states all busy conducting experiments.

[18] Professor Tribe in this passage corrects the previous edition of his treatise in which he accepts and espouses Petitioner's floors and ceilings approach under the rubric of "underenforced constitutional norms." *Compare id. with* Laurence H. Tribe, *American Constitutional Law* 31-33 (1st ed. 1978).

Finally, state court reliance on the federal constitution to provide its own state citizens unique rights actually retards development of state law as a means promoting favored rights. In *Smart v. State*, 146 P.3d 15 (Alaska App. 2006), the Alaska Court of Appeals dealt with the application of *Blakely v. Washington*, 542 U.S. 296 (2004), to cases on postconviction review. Rejecting *Teague* and creating broader Sixth Amendment rights available only to collateral review defendants in Alaska, the court of appeals upset the finality of defendant's sentence and granted a resentencing jury. The court of appeals did so despite recognizing that the Alaska Supreme Court had "suggested that the framers of our state constitution intended to adopt a right of jury trial broader than the right recognized at that time under federal law." *Smart*, 146 P.3d at 38. The court of appeal's decision raises important questions. First, if limiting *Teague* is essential to keeping federal authority out of the states' way in protecting individual liberties, why did Alaska never construe its broader state constitutional jury trial right as imposing a *Blakely*-type requirement and what is keeping Alaska from doing so now?[19] Second, what do the citizens of Alaska do if they are unhappy with the unique non-compulsory federal right the Alaska Court of Appeals has sent into Alaska prisons to upset the finality of sentences?

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[19] The dissent in *Smart* suggests one possible answer: that the Alaska "supreme court would not favor adopting *Blakely* under the Alaska Constitution and applying Alaska law on retroactivity." *Smart*, 146 P.3d at 42.

IV. THE STRONG INTERESTS *TEAGUE* RESTS UPON AND THE LACK OF ANY LEGITIMATE COUNTERVAILING STATE INTEREST REQUIRES *TEAGUE* APPLY TO STATE COLLATERAL REVIEW PROCEEDINGS.

There is no real disagreement that this Court's doctrine relating to the retroactivity of federal constitutional rulings imposes a federal requirement. For *Teague*, the requirement is that the federal constitutional rule in effect at the time defendant's conviction became final must be used to determine whether the defendant is entitled to collateral relief. The crux of the matter, therefore, is not the source of this Court's authority to adopt the retroactivity principles of *Griffith*, *Teague*, and the civil cases, and that Petitioner spends so much effort seeking to redefine as "methodology," "policy," or "remedy." This Court's retroactivity doctrine as set out in *Griffith*, *Yates*, *Teague*, *Teague*'s new rule requirement, *Teague*'s exceptions, and the civil cases, is federal authority that is binding on the states and has served well for more than twenty years without a label. Even Petitioner agrees that in the one small corner of retroactivity doctrine he claims as distinct from *Griffith*, *Teague*'s new rule analysis, *Teague*'s exceptions, and the civil cases, federal authority sets what he describes as the minimum constitutional requirements.

The crux of the matter, therefore, is whether, relying on the authority of the federal constitution, a state may ignore *Teague* (and, in this case, *Whorton v. Bockting*), and declare, in a declaration good in one state only, that citizens enjoy a federal constitutional right more broadly protective of individual rights (and less subject to federal court review). *Oregon v. Hass* answers the question in the negative, and for very sound reasons.

There are strong interests identified and at work in *Teague* and its progeny. Federal constitutional supremacy and uniformity, served by having citizens of all states operate under the same federal constitutional rules, is essential to our federal constitutional system. Finality and federalism, served by leaving state convictions which have become final free from upset by changing federal constitutional law, are also essential to our federal constitutional system. In the face of these essential federal and state interests (interests *Teague* fully recognizes and serves), Petitioner puts up a notion, already rejected by this Court, that states should be set loose on a course of selectively enhancing preferred individual rights as a matter of federal constitutional interpretation. States are, of course, free to prefer select individual rights, but they must do so under their own state law. Acting under state law, a state can prefer select individual rights in a manner that implicates none of the important interests identified above. Acting under state law, state decisions will be fully accountable to all of the state political and legal processes that should bear on the decision, rather than sneaking past state citizens under a cloak of illegitimate federal authority.

At the end of the day, whether one characterizes the essential federal constitutional interests the *Griffith-Teague* retroactivity principles recognize as enforcement of constitutional norms and the integrity of judicial decision making under Article III, *see Griffith*, 479 U.S. at 322, federal supremacy, *see* U.S. Const. Art. VI, cl. 2; *Harper*, 509 U.S. at 100, preemption, *see Gonzales v. Oregon*, 546 U.S. 243 (2006), reverse Erie, *see Felder v. Casey*, 487 U.S. 131, 161 (1988) (J. O'Connor, dissenting), an application of federal common law, *see Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091 (2007), or simply leaves the result without a

label, *see, e.g., Yates*, 484 U.S. at 217-218 (reversing state collateral review case); *Roper v. Simmons*, 543 U.S. 551 (2005) (same); *Kitchens v. Smith*, 401 U.S. 847 (1971) (same); *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (same), the result is the same. The Minnesota Supreme Court correctly ruled that *Griffith* and *Teague* required it to apply the relevant federal rule as it existed when Petitioner's conviction became final.

CONCLUSION

Respondent, the State of Minnesota, respectfully requests this Court to affirm the decision of the Minnesota Supreme Court.

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Dated: August 23, 2007